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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6721

BURLINGTON NORTHERN INC., et al.,

Appellants,

vs.

STERLING COLORADO BEEF COMPANY,

Appellee.

On Appeal from the United States District Court for the District of Colorado

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Burlington Northern Inc., et al., appeal from an order of a three-judge district court which reversed and remanded an order of the Interstate Commerce Commission in Docket 35021, reported at 339 I.C.C. 530 (1971).

OPINIONS BELOW

The opinion and order of the District Court for the District of Colorado is not yet reported. The opinion of Division 2 of the Interstate Commerce Commission is reported at 339 I.C.C. 530 (1971). The recommended report and order of the Commission's Hearing Examiner was unreported. Copies of all these opinions are set forth separately in the appendix.

JURISDICTION

The order here sought to be reviewed was entered in a suit initiated by appellee with District Court for the District of Colorado on February 25, 1974, pursuant to 28 U.S.C. Sec. 1336 to annul, enjoin and set aside the Commission order reported at 339 I.C.C. 530. A three-judge court was convened as then required by 28 U.S.C. Sec. 2325. The judgment of the district court was entered on August 17, 1976, remanding the decision of the Interstate Commerce Commission in accordance with the views expressed therein. (App. A. pp. 1a-7a).

Two notices of appeal were filed in the district court. The first notice was filed by these appellants on August 27, 1976 and the second notice by the Interstate Commerce Commission on October 15, 1976. (App. D. pp. 37a-40a). Because of the double filing there is some confusion by counsel regarding the provisions of Supreme Court Rule 13(1) that appeals be docketed "sixty days from the filing of the notice of appeal." It is clear that the jurisdiction of this court attached upon the undisputed timely filing of the notices of appeal.

Therefore, any mistake by counsel in the time the docketing of this appeal is not jurisdictional and may be waived. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86 (1947). Since it is clear that no party has been prejudiced, appellants formally and respectfully request that any nonjurisdictional defect be waived.

Jurisdiction to review the decision of the district court by direct appeal is conferred on this court by 28 U.S.C. Sections 1253 and 2101(b). See, e.g., *American Commercial Lines v. L&N R. Co.*, 392 U.S. 571 (1968).

QUESTIONS PRESENTED

1. Whether the decision of the court below is in conflict with the decision of this court in *Great Northern Railway Co. v. Sullivan*, 294 U.S. 458 (1935).

2. Whether the court below applied a clearly erroneous scope of review function in its judicial review of administrative agency action.

3. Whether the court below erred in directing the administrative agency to depart from its prior decisions without justification.

STATUTES INVOLVED

The statutory provision pertinent to this appeal is the scope of review section of the Administrative Procedure Act contained in 5 U.S.C. Section 706. It provides as follows:

> "To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

STATEMENT

By a complaint filed with the Interstate Commerce Commission in 1968,[1] the Sterling Colorado Beef Company elected to seek reparations or money damages through the administrative agency process, rather than by a suit filed in a U. S. District Court.[2] During the involved period, Sterling was shipping fresh meats via rail piggyback or trailer on flat car (TOFC) from Sterling, Colorado to various destination markets. Sterling's meat shipments were primarily destined to the Chicago and New York markets. Two separate and distinct rail rates were assailed by Sterling in their complaint filed with the Commission. The shipment which terminated at Chicago moved on the local western rate. The rates on shipments to the New York or eastern markets consisted of single factor through rates and lower combination through rates, consisting of western and eastern factors.[3]

The Commission directed that Sterling's complaint be handled under its modified procedure regulations. This procedure involves the submission of evidentiary material and argument in written form with no oral hearings for purposes of cross-examination. Sterling's evidence before the Commission was directed solely to the alleged unreasonableness of the western factor rate to Chicago and no evidence was submitted in regard to the eastern factor rates.

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[1] Assigned Docket No. 35021 by the Commission.

[2] Section 9 of the Interstate Commerce Act (49 U.S.C. Sec. 9) provides for such an election.

[3] Although Sterling assailed the rates to the New York markets they did not name the eastern railroads as party defendants in their complaint before the Commission.

The matter was subsequently assigned to a Commission Hearing Examiner[4] for timely disposition and in his initial decision he ordered the award of reparations to Sterling on its shipments terminating at Chicago based on a finding of unreasonableness of the western factor rate. However, reparations were denied on shipments to the eastern markets based on Sterling's failure to sustain its evidentiary burden of proving that the through rates were unreasonable. (App. C. p. 31a) With exceptions not here relevant this initial decision was affirmed through the Commission appellate process, culminating in the decision of Division 2 of the Commission on July 9, 1971, reported at 339 I.C.C. 530 (App. B. p. 15a).

Several years later, in 1974, a judicial review action was instituted by Sterling Colorado Beef Company in the U. S. District Court for the District of Colorado seeking an order directing the Commission to require the defendant railroads to pay reparations on those shipments which terminated at the New York or eastern markets which the Commission had considered in Docket 35021. On August 17, 1976, judgment was entered by the three-judge court, reversing and remanding the proceedings to the Commission based on its conclusion that the denial of the reparations claimed by Sterling Beef on shipments to points east of Chicago was an error of law. (App. A. p. 5a).

In the court below, appellants argued that the Commission was simply adhering to its long settled principle that a shipper-complainant cannot substantiate its burden of proving a through combination rate unreasonable by evidence directed to only one of the fac-

[4] This descriptive title has been subsequently changed to Administrative Law Judge.

tors and that this principle had been specifically upheld by this court, when it had an opportunity to consider this proposition.[5]

The court rejected this argument finding that it need not attempt any definitive interpretation of the *Great Northern* decision. Instead, the court proceeded to reweigh the Commission evidence and substituted its conclusion for that of the Commission in holding that the plaintiff did sustain economic injury on all of its shipments to the east, regardless of the points of termination. (App. A. p. 4a).

[5] *Great Northern Railway v. Sullivan*, 294 U.S. 458 (1935).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this case are of critical importance to all railroads and shippers in the United States. The question arises consistently in cases before the Interstate Commerce Commission and involves monetary sums of substantial magnitude.[6]

The holding of the court below conflicts with the decision of this court in the *Great Northern* case and is squarely at odds with over sixty years of consistent interpretation of the Interstate Commerce Act by the Commission regarding the evidentiary standard necessary to support reparation awards.

Although the lower court reversed and remanded on the grounds that the Commission committed an error of law, the court failed to cite any such controling law in support of its unwarranted conclusion. Indeed, as noted above, applicable judicial and administrative precedents are consistently and uniformly to the contrary.

1. In *Great Northern Railway v. Sullivan*, 294 U.S. 458, 462-463 this Court held that reparation awards in Commission proceedings must be justified by specific findings by the agency that the amount of the total charge was unjust and unreasonable. In the *Great Northern* case the issue was whether a shipper could prevail in a reparation action based on a showing that

[6] The instant case is just one of many such cases decided annually by the Commission and it is estimated that in excess of a half million dollars is involved in just this one case. This case, therefore, is of great importance to appellants not only because of the particular situation involved but also because of its precedential importance in other litigation involving reparation awards.

one of the factors in a proportional or combination through rate was unreasonable. The Court clearly held that such a showing was inadequate to justify a Commission order for reparations without a specific finding that the total charge was excessive.

Predating the *Great Northern* decision this legal principle had been consistently applied by the Commission in reparation proceedings since 1917.[7] Since the *Great Northern* decision and in accord therewith the Commission has continued to apply this legal principle in reparation cases.[8]

In this case, the shipper offered no evidence before the Commission as to the alleged unreasonableness of the eastern factor or the combination through rate. Therefore, the Commission necessarily could not and did not make a finding concerning the unreasonableness of the eastern combination factor or of the combination through rate. Under these factual circumstances this Court held in the *Great Northern* case that the charges must be deemed to be just and reasonable. 294 U.S. 458, 461.

Although the lower court appeared to recognize this principle in its opinion (App. A. p. 32), it clearly misconstrued the effect of the *Great Northern* decision by its finding that the combination through rate was unjust and unreasonable. The lower court in attempting to distinguish the *Great Northern* case from the instant case, stated:

[7] See, e.g.—*Cairo Board of Trade v. CCC&St. L. Ry. Co.*, 46 I.C.C. 343, 350 (1917); *G. W. Zaring & Co. v. Florida East Coast Railway Co.*, 153 I.C.C. 647, 650 (1929); *Fraser-Smith Co. v. Grand Trunk Western Ry. Co.*, 185 I.C.C. 57, 58 (1937).

[8] See, e.g.—*United States v. Beaumont SL&W Ry. Co.*, 301 I.C.C. 231 (1957); *United States of America v. Central of Georgia Ry. Co., et al.*, 332 I.C.C. 33, 36 (1967).

> "The combination rates involved in *Great Northern*, however, differed from those here in that rather than combining independently published local rates, the combination was of proportionals, which were used only to divide the through rate between participating railroads." (App. A. p. 3a).

Appellee had argued below that the *Great Northern* case was distinguishable because proportional rather than combination rates were involved. This is clearly a distinction without a difference since the Commission has consistently held that factors making up the through rate whether proportional or combination, merely represented division of such through rates among participating carriers.[9] The validity of this principle cannot be effected by the mere mechanics of tariff publication.

The lower court clearly erred in its opinion by indicating that it need not attempt any definitive interpretation of the *Great Northern* case in reaching its decision. This is further illustrated by the specific holding in the *Great Northern* case that a through rate may be reasonable although one or more of the factors of which it is composed may be unreasonable. The lower court erred in holding that when one factor of a through rate is found unreasonable, the measure of damages for the through rate is the excess of such factor over an assumed reasonable factor. This clearly conflicts with the specific holding of this court in the *Great Northern* case which requires a showing as to the unreasonableness of the through rate, which was absent from the shipper's showing before the Commission.

Therefore, the decision of the lower court should be summarily reversed and vacated because of its clear conflict with this court's decision in the *Great Northern* case.

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[9] *Morrell v. NYC*, 104 I.C.C. 104, 128.

2. The lower court has applied a clearly erroneous judicial review standard in reaching its conclusion. The scope of review function by a reviewing court in considering administrative agency decisions requires reversal only when the agency action is unsupported by substantial evidence. Administrative Procedure Act, 5 U.S.C. Section 706(2(E)); *Illinois Central R. Co. v. Norfolk and Western R. Co.*, 385 U.S. 57, 65-66 (1966).

Under the Interstate Commerce Act, a shipper-complainant has the burden of proving that tariff charges are unjust and unreasonable in order to support a reparation award. In this case, the Commission made an ultimate finding that the complainant had not met its burden of showing the total through charges to be unjust and reasonable. (App. B. p. 15a). This agency finding cannot be found to be unsupported by substantial evidence when the shipper's only evidentiary showing related to the alleged unreasonableness of one of the two factors involved in the combination through rate. One of the defects in the opinion of the lower court was its reweighing of the agency testimony in setting aside the negative burden of proof finding by the agency. The lower court would establish a principle that the agency may not make a negative burden of proof finding unless the carrier defendants present substantial evidence to support the contrary conclusion. The effect of the decision below is clearly erroneous in transferring the burden of proof to carrier defendants. It is clear that a negative finding as to lack of substantial evidence to show rates are unjust and unreasonable need not be supported by substantial evidence that rates are just and reasonable.

For the lower court to set aside a negative burden of proof finding is a clear indication that it simply substituted its judgment for that of the Commission as to

whether or not the burden had been met. It is not within the power of the lower court to affirmatively hold that a complainant-shipper has met its burden of proof when the Commission has specifically held to the contrary. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 618-619 (1966).

The lower court erred by substituting its own affirmative finding that the shipper had sustained economic injury on shipments to the eastern markets. This conclusion of the lower court ignored the negative burden of proof finding by the agency. The lower court in so doing exceeded its scope of review function under the Administrative Procedure Act. Authority to set aside agency action is manifestly not authority to make new and contrary findings and to decide on the merits an issue entrusted to the administrative agency for determination.

It is appellants' position that the lower court decision has applied erroneous judicial review standards under the Administrative Procedure Act and, therefore, that decision should be summarily reversed and vacated.

3. The lower court also erred in abrogating to itself the right to direct an administrative agency to depart from its prior decisions. As noted earlier, the decision of the Commission in this case was consistent with a long series of Commission precedents in reparation proceedings, as well as the decision of this Court in the *Great Northern* case.

When an administrative agency has established a consistent pattern of decisions over an extended period of time, it is reasonable to assume that such legal principles embodied in those decisions will remain in force. This is reinforced when the legal principle established in such series of agency decisions has been specifically

sanctioned by a decision of this court. If an agency is to depart from its prior decisions, such departures must be clearly justified and articulated. Recently, this court remanded an action to the Interstate Commerce Commission and required the agency to justify its departure from its prior decisions. *Atchison Topeka & Santa Fe Railway Co., et al. v. Wichita Board of Trade*, 412 U.S. 800 (1973). If it is error for an administrative agency to depart from its prior decisions without justification, it cannot be gainsaid that the attempt of a reviewing court to require an agency to do so, as in this case, is clearly erroneous. The only possible rationale for such excess of zeal by a reviewing court would be a finding that such legal principle is purely arbitrary or capricious. There is no such finding by the lower court in this case. Indeed, the legal principle at issue here appears to be legally and factually sound.

CONCLUSION

Because of the conflict between the lower court decision and the decision of this court in the *Great Northern* case and because the lower court exercised an improper judicial review standard, this Court should summarily vacate and reverse the lower court's opinion or, in the alternative, note probable jurisdiction since the issues here presented are substantial.

Respectfully submitted,

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